

## **EXHIBIT F**

understanding material that is undisputedly not claimed to be subject to such protection in this matter.

34. First, upon review of the Complaint, Berry testimony (both written and oral), and responses to various Interrogatories, I note that Berry does not claim that defendants infringed his copyright with respect to the *data* contained in the database. Indeed, it is undisputed that the data are owned by the defendants and cannot be the subject of copyright protection. Berry was not the author of the data. The data were entered by the employees, who frequently were themselves copying from other sources. See e.g. Exh P.

35. All that remains for possible copyright infringement claims is the specification and organization of specific tables within the database. In written and oral testimony, both Berry and Johnson refer to this as “the structure” of the database. Although the term structure may refer to different aspects of a database, both Berry and Johnson further specify the “relational structure” of the database. By “relational structure,” I understood that these are the specific copyright claims that Berry identifies in the Interrogatory responses attached as Exhibit D, the complaint, and are the subject of the Dr. Johnson’s expert report. Berry specifies specific elements of his database that he alleges were copied in what is now Exhibit I to my Declaration. Therefore, these are the focus of my analysis of possible copyright infringement.

## **XII. APRIL-JUNE 2003 SOFTWARE: THE DUAL DATABASES.**

36. I understand that after the verdict in the pre-petition case, Fleming intended to revert back to the original, licensed Berry 1993 FCS product. I understand that it is undisputed that Fleming operated this database until June 9, 2003, at which time Fleming began to use the 2003 Excel Spreadsheets. I further understand that Berry alleges that the Dual Databases constitute unlicensed derivative works and therefore represent infringement of Berry’s copyright during the time period of April 2003 through June 9, 2003. This section details my analysis of Berry’s claims in this regard. In summary, I find Berry’s claims to be without merit.

37. I understand that Fleming intended to revert back to the licensed version of the Berry software by removing all changes that were made by Fleming to the Berry 1993 FCS database (leaving the original Berry database), and by creating a new database that only contained

Fleming-created materials that did not fit within the context of the original 1993 FCS database. Thus I refer to these databases as the “Dual Databases,” since it contains two parts: “Original Logistics Data.mdb” and “Auxiliary Logistics Data.mdb.”<sup>2</sup> I understand that it is undisputed that Fleming intended that the database called “Original Logistics Data.mdb” was to be precisely identical to the licensed 1993 FCS Database. Thus I will refer to this database as the “2003 Fleming FCS Database.” I further understand that it is undisputed that Fleming created the second database called “Auxiliary Logistics Data.mdb.”

38. Based on my review of the Complaint, the Berry Affidavit, the Berry Declaration, Berry responses to Defendant’s Interrogatories, and Berry deposition testimony, I understand that Berry has three contentions regarding this process:

- that Berry never authorized defendants to use any of his copyrighted works after April 1, 2003 (Berry’s Concise Statement of Facts in Support of Motion for Summary Judgment, ¶ 5);
- that the “2003 Fleming FCS Database” is not identical to the licensed 1993 FCS database and thus represents an unauthorized derivative of the licensed 1993 FCS database (see the Memorandum in Support of Motion for Summary Judgment page 3); and
- that the “Auxiliary Logistics Data” database, authored entirely by Mark Dillon, is in itself an unauthorized derivative work. (See Deposition Transcript of Wayne Berry dated May 18 and 19, 2005.)

I will address each of these contentions in turn.

39. As a threshold matter, I understand that Fleming maintains that it continued to have a valid license to use Berry’s works after April 1, 2003. Further, I note that Berry himself admits that the jury verdict did not terminate, cancel, or revoke Fleming’s license to use 1993 FCS (see Berry’s Response to Fleming’s First Request for Admissions Propounded to Wayne

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<sup>2</sup> Berry refers to this second database by a number of different names, including “Auxillary Logistis Data,” “Auxillary Logistics Data,” and “Auxiliary Logistics Data” at different points in his Affidavit. I assume these references are typographical errors and that he intended to uniformly refer to the database “Auxiliary Logistics Data” created and used by Fleming in 2003.

Berry Re: Claim No 18704 dated Sept 23, 2004 response to RFA No. 1, attached as Exh. E). Thus, for the purposes of my analysis of the Dual Databases, I will assume that Fleming did indeed have a valid license to continue to use the Berry Database, and I will address the remaining issues above.

40. I understand that Berry contends that Fleming was not in fact using the licensed version of his database. Upon investigation, I found that Mr. Berry identified certain differences between the licensed software and the version that Fleming was using in April through June 2003. In particular, Berry identified 7 fields that were not in the licensed database. He identified these fields in Exhibit 27 of the Affidavit of Wayne Berry filed on Sept 20, 2004, attached to my Declaration as Exhibit F. The first 7 lines of Berry Exh. 27 list database fields identified by Berry that were in the software used by Fleming. I confirmed that these fields were not present in either the licensed software or in the copyright filing.

41. I next investigated the substance and magnitude of these modifications. First of all, it is important to note that the Berry 1993 FCS contains 1334 fields. The seven additional fields identified by Berry thus represent an insignificant extension: on a numerical basis, 7 differences out of 1334 total fields yields the conclusion that the databases are 99.5% identical. Further, I understand the function of these added fields is merely ancillary to the operation of the database.

42. Attached as Exhibit G is a chart detailing the purpose of each of the seven added fields. In summary, one field was experimental and not part of the operation of the database; four fields were used to facilitate the exporting of Fleming's data (a "fair use" of the database), and two fields were temporary fields created to aid recovery of lost data (no data was permanently stored in these two fields). As can be seen, these seven fields are in no way part of the normal operation of the database. Thus it is my expert opinion that the two databases are practically identical from both a numerical perspective and a functional perspective. Further, as stated above, I understand that it is undisputed that the intent of the defendants was to make the databases identical. As a result, it is my further opinion that, for the purposes of this litigation, the file "Original Logistics Data.mdb" should not be considered to be an unlicensed derived work

# **Exhibit 27**

**Fields from  
Dillon Queries  
That are not in  
FCS 1993**

Berry FCS 1593	Fleming Version Nov 2001	Original Logistics Data.mdb	Auxiliary Logistics Data.mdb	Dillon Import Import Queries	Dillon 2003 Queries.mdb
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## Fields From Dillon Import Queries May - June and July 2003

1 Name - Company.ScratchName AS Fleming Name	No	Yes	Yes	No	Yes	Yes
2 NotesCtnFirsts .FirstOfFlemingLocations AS Fleming Location	No	No	Yes	No	Yes	Yes
3 NotesCtnFirsts.FirstofLastDayToReturn AS Last Day To Return	No	No	Yes	No	Yes	Yes
4 NotesCtnFirsts.FrstOfStatus AS Return Status	No	No	Yes	No	Yes	Yes
5 NotesCtnFirsts.FirstCtStatusDate AS Status Date	No	No	Yes	No	Yes	Yes
6 ARPayments.Voucher Number Old AS Check ID	No	No	Yes	No	Yes	Yes
7 ARPayments.Distribution.Voucher ID Old	No	No	Yes	No	Yes	Yes
8 Rates - Miscellaneous.Service	No	Yes	No	Yes	Yes	Yes
9 Rates - Miscellaneous.Service Provider	No	Yes	No	Yes	Yes	Yes
10 Rates - Miscellaneous.Rate	No	Yes	No	Yes	Yes	Yes
11 Rates - Miscellaneous.Notes	No	Yes	No	Yes	Yes	Yes
12 Rates - Miscellaneous.Rate ID	No	Yes	No	Yes	Yes	Yes
13 Rates - Tariff.Carrier	No	Yes	No	Yes	Yes	Yes
14 Rates - Tariff.Tariff	No	Yes	No	Yes	Yes	Yes
15 Rates - Tariff.Destination	No	Yes	No	Yes	Yes	Yes
16 Rates - Tariff.Origin	No	Yes	No	Yes	Yes	Yes
17 Rates - Tariff.Container Type	No	Yes	No	Yes	Yes	Yes
18 Rates - Tariff.Container Size	No	Yes	No	Yes	Yes	Yes
19 Rates - Tariff.Drayage	No	Yes	No	Yes	Yes	Yes
20 Rates Tariff.Origin Wharfage	No	Yes	No	Yes	Yes	Yes
21 Rates - Tariff.Terminal Handling	No	Yes	No	Yes	Yes	Yes
22 Rates - Tariff.Ocean	No	Yes	No	Yes	Yes	Yes
23 Rates - Tariff. Fuel Surcharge	No	Yes	No	Yes	Yes	Yes
24 Rates - Tariff.Destination Wharfage	No	Yes	No	Yes	Yes	Yes
25 Rates - Tariff.Notes	No	Yes	No	Yes	Yes	Yes
26 Rates - Tariff.Tariff ID	No	Yes	No	Yes	Yes	Yes
27 Rates - Trucking.Service	No	Yes	No	Yes	Yes	Yes
28 Rates - Trucking.Service.Provider	No	Yes	No	Yes	Yes	Yes
29 Rates - Trucking.Origin	No	Yes	No	Yes	Yes	Yes
30 Rates - Trucking.Destination	No	Yes	No	Yes	Yes	Yes
31 Rates - Trucking.Load Type	No	Yes	No	Yes	Yes	Yes
32 Rates - Trucking.Rate	No	Yes	No	Yes	Yes	Yes
33 Rates - Trucking.Notes	No	Yes	No	Yes	Yes	Yes
34 Rates - Trucking.Trucking Rate ID	No	Yes	No	Yes	Yes	Yes
35 Vendor Defaults.Vendor ID	No	Yes	No	Yes	Yes	Yes
36 Vendor Defaults.Vendor Name AS Vendor	No	Yes	No	Yes	Yes	Yes
37 Vendor Defaults.Vendor Code AS Vendor Number	No	Yes	No	Yes	Yes	Yes
38 Vendor Defaults.Vendor Contact AS POC	No	Yes	No	Yes	Yes	Yes
39 Vendor Defaults.Vendor Location AS Vendor Site	No	Yes	No	Yes	Yes	Yes
40 Vendor Defaults.Vendor Phone No AS POC Phone	No	Yes	No	Yes	Yes	Yes
41 Vendor Defaults.Shipper	No	Yes	No	Yes	Yes	Yes
42 Vendor Defaults.Bill To AS Invoicee	No	Yes	No	Yes	Yes	Yes
43 Vendor Defaults.Consignee	No	Yes	No	Yes	Yes	Yes
44 Vendor Defaults.Buyer AS Merchandiser	No	Yes	No	Yes	Yes	Yes
45 Vendor Defaults.Port AS Default Port	No	Yes	No	Yes	Yes	Yes
46 Vendor Defaults.Terminal	No	Yes	No	Yes	Yes	Yes
47 Vendor Defaults.Commodity Group AS Climate	No	Yes	No	Yes	Yes	Yes
48 Vendor Defaults.Commodity Type AS Product Type	No	Yes	No	Yes	Yes	Yes
49 Vendor Defaults.Load Type	No	Yes	No	Yes	Yes	Yes
50 Vendor Defaults.Tariff	No	Yes	No	Yes	Yes	Yes
51 Vendor Defaults.Tariff Origin	No	Yes	No	Yes	Yes	Yes
52 Vendor Defaults.Destination Warehouse AS Warehouse	No	Yes	No	Yes	Yes	Yes
53 Vendor Defaults.Dept AS Account	No	Yes	No	Yes	Yes	Yes
54 Vendor Defaults.Destination Trucker	No	Yes	No	Yes	Yes	Yes
55 Vendor Defaults.DryWeight	No	Yes	No	Yes	Yes	Yes
56 Vendor Defaults.Project Backhaul Rate AS Allocated Backhaul Rate	No	Yes	No	Yes	Yes	Yes
57 Vendor Defaults.Project BackHaul Unit AS Allocated Backhaul Unit	No	Yes	No	Yes	Yes	Yes
58 Vendor Defaults.Project Freight Rate AS Allocated Freight Rate	No	Yes	No	Yes	Yes	Yes
59 Vendor Defaults.Project Freight Unit AS Allocated Freight Unit	No	Yes	No	Yes	Yes	Yes
60 Vendor Defaults.Freight Allowance Rate	No	Yes	No	Yes	Yes	Yes
61 Vendor Defaults.Freight Allowance Unit	No	Yes	No	Yes	Yes	Yes
62 Vendor Defaults.Cost by Weight	No	Yes	No	Yes	Yes	Yes
63 Vendor Defaults.Auto Deduct-	No	Yes	No	Yes	Yes	Yes
64 Vendor Defaults.Notes	No	Yes	No	Yes	Yes	Yes